

U.S. COMMODITY FUTURES TRADING)
COMMISSION et al.,)
)
Plaintiffs,)
)
vs.) Case No.: 05-cv-02641-JSW
)
NATIONAL INVESTMENT CONSULTANTS,) Judge: The Hon. Jeffrey S. White
INC., et al.,)
Defendants,) **JOINT CASE MANAGEMENT**
) **STATEMENT**
)
and)
) Date: November 4, 2005
) Time: 9:00 a.m.
THERESA C. WONG, an individual,)
Relief Defendant.) Dept.: 2
)
) [Filed Concurrently with [Proposed]
) Scheduling Order]

COMES NOW Plaintiffs, U.S. Commodity Futures Trading Commission (the “Commission”) and the Commissioner of Corporations of the State of California (“California”) (collectively “Plaintiffs”), and Defendants National Investment Consultants, Inc. (“NICT”) Raymond Tse, Flora Zhou, Yi Kerry Xu, Relief Defendant Theresa C. Wong and Specially Appearing Defendant Pacific Best Group Ltd (“Pacific Best”), and hereby submits this Joint Case Management Statement and Proposed Order, pursuant to this Court’s Case Management Order

1 filed June 29, 2005 and pursuant to Fed. R. Civ. P. 16(b) and 26(f) and Civil L.R. 16-9 and 16-
2 10.

3 **1. Basis for Jurisdiction**

4 Plaintiffs contend that jurisdiction is conferred upon this Court pursuant to 7 U.S.C. § 1 et
5 seq. (2002). Defendants assert as an affirmative defense that this Court does not have subject
6 matter jurisdiction over the foreign exchange contracts at issue in this action.
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8 Specially Appearing Defendant Pacific Best has filed a motion to dismiss for insufficient
9 service of process pursuant to Fed. R. Civ. P. 12 (b) (5). The motion will be resolved after a
10 hearing on the merits scheduled for November 4, 2005.

11 There are no issues as to venue. Plaintiffs do not intend to serve additional parties at this
12 time.
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14 **2. Brief Description of the Case and Defenses**

15 Plaintiffs Claims: Plaintiffs contend that since at least March 2004, defendants South
16 China Investments Inc. acting as a common enterprise with NICI (together the "South China
17 Common Enterprise") and Pacific Best fraudulently solicited and accepted at least \$356,500 from
18 at least 9 known retail investors to engage in speculative trading of off exchange foreign currency
19 futures contracts. Plaintiffs contend that investors of which Plaintiffs are aware of to date lost
20 almost all, if not all, of their investment. Plaintiffs further contend that defendants have cheated,
21 defrauded, and deceived customers by, among other practices: a) falsely misrepresenting the
22 profit potential from trading through their business; b) failing to disclose the risk of loss from
23 trading in foreign currency futures contracts through their business; c) failing to disclose the lack
24 of experience of the South China Common Enterprise account executives; and d) failing to
25 disclose the fact that Defendant Zhou was the subject of prior California litigation stemming
26 from similar fraudulent solicitation which resulted in an injunction against her.
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1 Plaintiffs allege that, by offering the foreign currency futures contracts, Defendants the
2 South China Common Enterprise and Pacific Best have violated Section 4(a) of the Commodity
3 Exchange Act (the "Act"), 7 U.S.C. §§ 6(a)(2002). Furthermore, Plaintiffs allege that by making
4 material misrepresentations and omissions, Defendants have engaged, are engaging, or are about
5 to engage in acts and practices that violate the anti-fraud provisions of Section 4(b)(i) and (iii) of
6 the Act, 7 U.S.C. § 6b(a)(i) and (iii) (2004) and Section 1.1(b)(1) and (3) of the Commission's
7 Regulations, 17 C.F.R. §§ 1.1(b)(1) and (3) (2002) and that Defendants' conduct is also in
8 violation of provisions of the California Commodity Law of 1990 (Cal. Corp Code Sections
9 29520 and 29536).

11 Defendants' Defenses: Defendants contend that they did not offer futures contracts in
12 violation of either the Commodity Exchange Act or the California Corporations Code and further
13 contend that they did not make any false misrepresentations. Defendants also contend that, at all
14 times, they advised clients of their risks associated with foreign currency trading; advised clients
15 that their investments were not guaranteed a profit; operated a legitimate business and
16 legitimately traded customer funds through a bank or other authorized foreign exchange
17 registered in Macau.

19 Related Proceedings: None.

21 **3. Legal Issues Genuinely In Dispute**

22 Plaintiffs and Defendants dispute whether the foreign currency contracts were offered by
23 Defendants in violation of either the Commodity Exchange Act or the California Corporations
24 Code. Plaintiffs and Defendants also dispute whether the Defendants fraudulently solicited
25 customers and whether Defendants otherwise employed fraudulent means in connection with the
26 offering of investments in foreign currency.
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1 **4. Procedural History**

2 On June 28, 2005, Plaintiffs filed a complaint for injunctive and other equitable relief and
3 for civil penalties as well as an *ex parte* motion for a preliminary injunction and statutory
4 restraining order. The Court granted Plaintiffs motion for an *ex parte* statutory restraining order
5 on June 29, 2005 and instructed plaintiffs to serve all defendants by June 30, 2005. Plaintiffs
6 contend that they properly served all defendants through the U.S. Marshall's Service on June 30,
7 2005. Specially Appearing Defendant Pacific Best disputes that service was appropriate.

8 The Plaintiffs' Motion for a Preliminary Injunction, initially scheduled to be heard on
9 July 8, 2005, was at the request of defendants' counsel continued to August 26, 2005. The
10 Statutory Restraining Order was extended through that date. On August 26, 2005, after
11 submission of written and oral arguments and declarations, this Court granted the Motion for a
12 Preliminary Injunction against defendants National Investments Consultants, South China
13 Investments, Pacific Best Group, and Flora Zhou for violations of various provisions of the
14 Commodity Exchange Act and the California Corporations Code. The Motion was denied as to
15 individual defendants Raymond Tse and Kerry Xu.
16

17 Plaintiffs' agreed to an extension of time for defendants to answer the complaint. On
18 August 4, 2005 and August 8, 2005 this Court entered Orders extending the time for defendants
19 to answer the complaint until August 26, 2005. To date all defendants, with the exception of
20 Pacific Best and South China, have filed answers.
21

22 Defendant Pacific Best contends that service upon Pacific Best was insufficient and filed
23 a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(5) on August 25, 2005. The motion has
24 been briefed and argument is scheduled for November 4, 2005, the same date as the Case
25 Management Conference.
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1 Plaintiffs and defendant Flora Zhou reached an agreement with regard to certain frozen
2 funds held in a joint bank account that defendant Zhou contends are her husband's property. On
3 September 27, 2005, a stipulation was filed to partially lift a freeze on the bank account of the
4 husband of defendant Flora Zhou to the extent the account included his separate property.

5
6 **5. Summary of Discovery to Date**

7 The parties have fully complied with the initial disclosure requirements of Fed. R. Civ. P.
8 26. In addition, the parties have conducted depositions of Plaintiffs' expert Ronald Hobson,
9 Customers Steven Ting, Christina Liang, and Defendant Yi Kerry Xu. Although Defendants
10 noticed the deposition of Customer Renee Ramos, Ms. Ramos failed to appear at her deposition.
11 Defendants are continuing their efforts to depose Ms. Ramos.

12 The depositions of Defendants Raymond Tse, Theresa Wong and Flora Zhou are
13 scheduled for the second week of January. Plaintiffs have obtained bank records and 12 boxes of
14 documents located in the offices of NICI. No party has served written discovery to date.

15
16 **6. Discovery Plan**

17 Plaintiffs anticipate that depositions will be limited to party defendants and any expert
18 witnesses identified by defendants. Defendants anticipate that depositions will be limited to
19 Customers identified by plaintiffs as well as plaintiff California Department of Corporation's
20 senior examiner Peter Mock.

21 The parties have tentatively agreed to the following depositions and time frames:
22 Plaintiffs will depose Raymond Tse (5 hours), Flora Zhou (5 hours), Theresa Wong (5 hours); a
23 designated representative of NICI (5 hours), Gordon Rauser (5 hours), and Wei Ming Deng (3
24 hours).

25 Plaintiffs will attempt to depose Xiao Jiao (5 hours), a designated representative of
26 Pacific Best (5 hours) and Lawrence Chi (5 hours), however, Defendants do not waive any right
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1 to assert jurisdictional objections or any other objections to these depositions. Plaintiffs reserve
2 the right to depose additional witnesses not disclosed in Defendants' Rule 26 Disclosure.

3 Defendants anticipate deposing Peter Mock (5 hours), all of the customer witnesses
4 identified by plaintiffs in Plaintiffs' Rule 26 Disclosure (3 hours per witness), Renee Ramos (3
5 hours), Danny Lui (3 hours), and Sylvia Obradovic (3 hours). Defendants reserve their right to
6 depose additional customer witnesses not disclosed in Plaintiffs' Rule 26 Disclosure.

7
8 Additionally, Plaintiffs have advised Defendants that Ronald Hobson is retiring and, therefore,
9 Plaintiffs may need to utilize another expert witness. If such is the case, then Defendants will
10 depose Plaintiffs' expert witness (5 hours).

11 Plaintiffs have obtained 12 boxes of documents through the execution of this Court's
12 statutory restraining order and through voluntary production by defendants. Plaintiffs intend to
13 conduct written discovery. Plaintiffs intend to serve Interrogatories, and Document Requests as
14 well as Requests for Admissions to ascertain the nature and extent of foreign currency trading
15 conducted by Defendants, the location of assets and customer funds taken in by Defendants, and
16 the factual basis for defenses asserted by Defendants.

17
18 Defendants intend to serve written discovery including Interrogatories and Document
19 Requests requesting Plaintiffs to provide all facts, witnesses and documents in support of
20 Plaintiffs' claims. Defendants also intend to serve Requests for Admission regarding certain
21 factual allegations and legal arguments Plaintiffs have asserted in this action. Defendants deem
22 the following information essential to obtain from Plaintiffs:

- 23
24 1. The basis for Plaintiffs' argument that the contracts at issue consisted of illegal
25 off-exchange futures contracts;
26
27 2. The basis for Plaintiffs' fraud claims against the individual Defendants Raymond
28 Tse, Theresa Wong, Yi Kerry Xu and Flora Zhou;

1 3. The basis for Plaintiffs' fraud claims against the corporate Defendants National
2 Investment Consultants and Pacific Best; and

3 4. The basis for Plaintiffs' allegation that any Defendant misappropriated any
4 monies. Defendants expect that written discovery will be complete before January, 2006.
5 However, the foregoing discovery plan is based on the parties "good faith" efforts to comply with
6 this Court's Order regarding the Joint Case Management Conference Statement and is based on
7 information currently known to the parties. Both parties reserve the right to depose additional
8 witnesses and to conduct additional discovery to the extent the need arises.

9
10 **7. Further Motions and New Parties**

11 The parties intend to file motions for summary judgment. Defendants may file a motion
12 for relief from the injunction and freeze order. The parties reserve the right to file all appropriate
13 motions *in limine* to address evidentiary issues as they arise in preparation for trial. At this time
14 Plaintiffs' do not anticipate joining additional parties.

15
16 **8. Relief Sought**

17 The Commission and the State of California seek restitution, disgorgement, and civil
18 monetary penalties in this action. Restitution is equal to the entire amount collected by the
19 Defendants from customers for the practices alleged in the Complaint, less any refunds provided
20 to customers prior to the institution of this lawsuit. Currently, the Plaintiffs are not aware of the
21 exact amount of trading losses that Plaintiffs contend were suffered by customers of the
22 Defendants. Once further documentation is obtained, the restitution figure will be determined.

23
24 The Commission seeks civil monetary penalties in accordance with the Commodity
25 Exchange Act which permits not more than the higher of \$120,000 (or \$130,000 for each
26 violation occurring on or after October 23, 2004) or triple the monetary gain to Defendants' for
27 each violation of the Commodity Exchange Act and the State of California seeks \$25,000 for
28

each violation of the California Corporate Code Sections 29520 and 29536 as authorized by Section 29544.

Defendants deny that Plaintiffs are entitled to any damages or other relief in this action.

9. ADR Efforts to Date

The parties have discussed settlement in some detail. Plaintiffs believe that they will be in a better position to engage in meaningful settlement discussions after the depositions of Raymond Tse and Theresa Wong. Given that Plaintiffs are government entities, and, since this action involves, *inter alia*, a request for injunctive relief, the parties believe that the best ADR option is a Settlement Conference before a Magistrate Judge. There is an ADR conference call scheduled on November 2, 2005, to discuss this option.

10. Assignment to a Magistrate

The parties do not consent to assignment of this case to a magistrate judge to conduct all further proceedings.

11. Proposed Deadlines

The parties propose the following deadlines:

1. ADR/ Settlement Conference Completion date: **January 31, 2006.**
2. Disclosure of expert or other opinion witnesses: **March 31, 2006.**
3. Close of Discovery: **June 30, 2006.**
4. Hearing on Dispositive Motions: **August 4, 2006.**
5. Filing of pre-trial briefs on all disputed issues of law: **September 8, 2006.**
6. Last Date to "meet and confer" re joint pretrial conference statement and proposed order and coordinated submission of trial exhibits and other material: **September 15, 2006.**
7. Filing of joint final pretrial conference statement and proposed order, lodging exhibits and other trial material including copies of all exhibits etc, filing of jury instructions, voir dire questions, forms of verdict, designated deposition excerpts, interrogatory answers and

1 responses to requests for admission: **September 22, 2006.**

2 8. "Meet and confer" re objections to receipt of evidence of proposed testimony or
3 exhibits: **October 2, 2006.**

4 9. Pretrial Conference to consider unresolved objections to proposed testimony and
5 exhibits and hearing on pre-trial motions: **October 13, 2006.**

6 10. Trial Date: **October 16, 2006.**

7 The parties anticipate eight to ten days for trial. Defendants have requested a jury trial.
8 Plaintiffs intend to call approximately 14 witnesses. Defendants intend to call approximately 9
9 witnesses. Plaintiffs estimate they will have approximately 200 exhibits. Defendants estimate
10 they will have approximately 100 exhibits.

11 **12. Service List for All Counsel**

12
13 Plaintiff U.S. Commodity represented Kevin K Phone:(202) 418-5636
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3	Consultants, Inc.	by	Eband	Fax: 213-576-8080
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6	Defendant National Investment	represented	Robert A.	Phone:415/371-1200
7	Consultants, Inc.	by	Weikert	Fax: 415-371-1211
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9	Defendant South China	represented	Lewis Phon	Phone:(415)421-1234
10	Investments, Inc.	by		Fax: (415)392-8715
11				Email: phonlaw@sbcglobal.net
12	Defendant Pacific Best Group	represented	Alexandra	Phone:213-576-8082
13	Ltd.	by	Eband	Fax: 213-576-8080
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15	Defendant Yi Kerry Xu	represented	John W.	Phone:213-312-1330
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26	Defendant Wei M. Tse	represented	Alexandra Eband	Phone:213-576-8082
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13. All Other Items Set Forth In Civil L.R. 16-10 are Set Addressed Above

14. Disqualification or Recusal

The parties are not aware of any person, association, firm, partnership, corporation or other entity that has either: (1) a financial interest in the subject matter at issue or in a party to the proceeding; or (2) any other kind of interest that could be substantially affected by the outcome of the proceeding.

1 Dated: October 28, 2005

2
3 By _____/s/
4 KEVIN K. BATTEH
5 JAMES H. HOLL, III
6 Attorneys for Plaintiff
7 U.S. COMMODITY FUTURES TRADING
8 COMMISSION

9 Dated: October 28, 2005

10 By _____/s/
11 EDWARD KELLY SHINNICK
12 WAYNE STRUMPFER
13 ALAN S. WEINGER
14 Attorneys for Plaintiff
15 COMMISSIONER OF CORPORATIONS OF
16 THE STATE OF CALIFORNIA

17 Dated: October 28, 2005

18 COTTON & GUNDZIK, LLP

19 By _____/s/
20 JOSEPH W. COTTON
21 Attorneys for Defendant
22 YI KERRY XU

23 Dated: October 28, 2005

24 By _____/s/
25 FRED S. KONIGSBERG
26 Attorneys for Defendants
27 RUN PING ZHOU aka FLORA ZHOU and
28 SOUTH CHINA INVESTMENTS, INC.

1 Dated: October 28, 2005

THELEN REID & PRIEST LLP

2
3 By _____/s/_____
4 EDWARD GARTENBERG
5 ALEXANDRA EPAND
6 ROBERT A. WEIKERT
7 Attorneys for Defendants
8 NATIONAL INVESTMENT CONSULTANTS,
9 INC.; WEI M. TSE a.k.a. RAYMOND TSE, and
10 for Relief Defendant THERESA C. WONG and
11 Specially Appearing for Defendant PACIFIC
12 BEST GROUP LTD, a.k.a. PACIFIC BEST
13 COMPANY LTD, a British Virgin Islands
14 Corporation
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I hereby attest that I have on file all holograph signatures for any signatures indicated by a "conformed" signature (/s/) within this efiled document.